No. 22000

# United States
# Court of Appeals
## for the Ninth Circuit

Fruit Industries Research Foundation, d/b/a
Food Industries Research & Engineering,

*Appellant*

vs.

The National Cash Register Company,

*Appellee.*

# BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE WILLIAM N. GOODWIN, *Judge*

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## ADDITIONAL AND COUNTER-STATEMENT OF THE CASE

Although the statement of the case in the brief of appellant is substantially correct in presenting the basic questions involved and in detailing the rulings and proceedings of the trial court, nevertheless some additional statement of the case and counter-statement is essential for the issues to be brought into proper perspective.

The pretrial order, which presented the issues and the only issues before the trial court, reveals that the appellant, Fruit Industries, was bringing an action against the appellee, National Cash Register Comapany, for claimed fraudulent representations in two particulars:

> (A) An alleged false representation that its equipment known as NCR 390 was suitable, appropriate and adequate for service bureau data processing and computer work; and
>
> (B) An alleged false representation that the ap pellee would aid, assist and cooperate with the appellant in sending and furnishing customers to it and that appellant would not need any sales force itself to obtain patronage (Tr. 36-43).

With respect to (A), the claimed lack of adequacy of the equipment, the pretrial order reflects that this alleged inadequacy involved only claims that (1) the printout and reading rate of the equipment was too slow, (2) that the memory core was not large enough, and (3) that the equipment lacked the capacity of handling alpha betical work. No other issues were tendered or litigated in the trial court, and the trial court carefully confined the evidence under (A) to the issues presented in the pretrial order and did not allow them to be expanded or enlarged when proper objection was made by the appellee (R 189-191; 75-78; 83-84; 329-331; 335; 339-340; 345-47). For example, no issue was tendered or considered relating to claims of breakdowns or extensive repairs such

as is intimated by the appellant in its statement of the case in its brief on page 7. (R. 339-340; Tr. 36-43). Neither was there any issue involving the proper or improper programming of the machine, as indicated on page 6 of its brief (Tr. 36-43).

It appears clearly from the record that the principal officer of the appellant, who dealt with the representative of appellee in negotiating for the purchase of the NCR 390 was Philip Fluaitt, who was its treasurer, office manager, and the man in charge of the computer and data processing department of the appellant corporation (R. 217-18). Mr. Fluaitt was the one who dealt principally with Chester K. Rasmussen, the local representative of National Cash Register (R. 213-14; 217-18). He was one of two agents of appellant who was given computer training with respect to the equipment following its purchase and prior to its delivery, and he was the person who initially directed the operation of the equipment after it was placed in use by the appellant (R. 83; 235). With respect to the specific claims of deficiency in the equipment asserted by Fruit Industries, Fluaitt testified:

1. So far as the print-out rate of the equipment being slow, he testified that he knew this before the purchase was ever made (R. 235); that he was so well advised about it that he had actually intended to and did place in line and operate another piece of more rapid

print-out equipment to work with the NCR 390 after it was received (R.241-242; 227). He stated that Rasmussen did not represent that the print-out rate of the equipment was fast and to him this was not important whether it was fast or slow (R. 229). He also testified he had formed an opinion that the machine was not working properly before it was ever delivered (R. 240-241).

2. Neither Fluaitt, nor anyone else for that matter, testified that the in-put reading rate of the equipment was misrepresented or was regarded as a factor in the company's claimed unsuccessful operation of the equipment (R. 235-236). Its expert testified that the in-put reading rate was adequate (R. 451).

3. Fluaitt, as well as all others, testified that the equipment would do alphabetical work, contrary to the contention in the prettrial order (R.236, 451), and stated that the alphabetical ability of the machine was known by appellant; had not been misrepresented before its purchase (R. 249).

4. Fluaitt testified that the memory core of the equipment was not misrepresented in any way, and was exactly as described in the literature which was submitted to the company prior to its purchase (R. 233-234; 249).

5. Fluaitt testified that Rasmussen had never quaranteed that the operation would be "profitable" (R. 222).

With respect to Exhibit 5, a projected example of possible income submitted to the appellant by Rasmussen, Fluaitt testified that he did not believe the figures and placed no reliance on them prior to purchase (R. 223).

6. Fluaitt further testified that notwithstanding his criticism of the machinery *it could have operated profitably and successfully with sufficient customers of a certain type* (R. 250-251).

With respect to (B), the officers of the appellant corporation all asserted that Rasmussen had agreed with them that he would, *in the future* and *after* the equipment was purchased and in place, advise his sales staff of the fact that a data processing center with NCR equipment was located in Yakima and would encourage future customers to be obtained by the appellee to send their work to that center, and they also asserted that Rasmussen told them it would be unnecessary for them to hire a sales staff in the future and represented that he would provide work for them *in the future* which would make their operations profitable (R. 132; 147-9; 326). Mr. Rasmussen on the other hand, flatly and categorically denied that he had ever told the appellant company that it would not need a sales force or that he would supply the sales force (R. 37). He flatly denied that he guaranteed any profitable operation to the appellant corporation (R.36). The appellee did agree and Rasmussen testified that he told

the prospectivve purchaser that he, Rasmussen, would tell any future customers his people might obtain about the service bureau of appellant and Mr. Rasmussen would encourage any to use the service bureau of appellant (R. 34-36).

Regardless of what testimony is believed, the record is clear that Rasmussen was not making representations about any existing fact, but, at the most, was making a promise to perform some act in the future. The evidence established that Rasmussen and the appellee company *did* obtain customers for the appellant after it set up the equipment and *did* bring prospective customers to the service bureau of appellant, and did encourage its contacts to use the service of the appellant (R. 68-73; 155-160).

In the statement of the case contained in the brief of the appellant, gratuitous references are incorporated with respect to matters which have no place in this appeal, and other statements are made which the record does not support.

On page 7 of the brief, a matter to which appellee has already adverted, the statement is made that "serious malfuntions and breakdowns requiring expensive repairs"occurred. Whether repairs were or were not required is not an issue in the case, no contention being made that there were any representations that the equip-

ment would not require repairs, and such evidence was rejected by the court as immaterial (R. 339-340). In any event, the record does not show that there were frequent "breakdowns" or "expensive repairs".

It is also contended by appellant on page 7 that it made numerous complaints to Rasmussen as to the unsuitable and unsatisfactory "operation of the equipment" and it is said that appellee "wholly disregarded" these complaints. The references to the record, namely R. 89-94, 133-4, 187-8, 348-51, 408-10, reveal respectively, as follows: that Rasmussen said that any complaints which were made to him were complaints by the appellant of its own inadequacies and inability to operate the equipment; a complaint by Hunter, one of the officers of Fruit Industries, that more work should be provided for the machine; testimony by Fluaitt that he complained of delays in repair and Fluaitt testified he knew of no other complaints; and the complaints of Carlsen concerning the programming of the machine and statements by Carlsen that he complained about the inadequate machine to Rasmussen, admitting at the same time that he was asking Rasmussen to get more work for the equipment.

On page 8 of its brief, the appellant states that it acquired an IBM machine in 1961, and that it resold the NCR 390 equipment for a sum less than it paid for it. The evidence actually indicates that the equipment which it

acquired was a newer, larger, and considerably more recent and expensive model than the NCR equipment which it had, and that it was acquiring the larger equipment because of its increased business and business capacity. (R. 291-293; 544-45; 492-93; 450-1).

The statement on page 8 that the NCR 390 equipment is not used by any service bureau is not only immaterial, but unsupported by the record. The references to the record contained in the brief of appellant are: R.20, 31-3, 302, 304, 351, 417, 440-1; Tr. 21-32. An examination of the record at these pages indicates that Rasmussen testified that he did not know and could not say what NCR 390 equipment was then in use; the witness, Loveless, who was the then employee and data processing operator for appellant, testified that he did not know of any such equipment; the witness Carlsen attempted to testify that he had conducted a "survey" concerning the NCR 390 and his attempted testimony was not permitted and stricken for obvious seasons; and the expert witness for appellant, James Powell, an operator in Portland, testified he did not know of NCR 390 equipment in service bureau work at the time of trial and testified that since 1962 the trend had been to replace smaller machines with largeer and more expensive ones (R. 450). The reference to the transcript (Tr. 21-32) reveals the true picture: No one can say how many of the 3,000 NCR

390's that had been sold (R. 304) are being used for service work or not being used, because some purchasers who bought them for private use have converted them to service bureau use and others who bought them for service bureau use have converted them to private use (Tr. 21-32). In any event, the whole subject matter is immaterial and should not have been introduced into the statement by the appellant.

On page 8, appellant sets forth a claim concerning its alleged damages, and asserts it had large losses from operating the equipment. All of this, of course, is beside the point involved on appeal. In any event a reference to the record will indicate that the figures set forth represent the concept of Earl Carlsen with reference to the value of the equipment, and examination of his testimony will quickly indicate how weak it was and how wrong and mistaken he was about the values (R. 353-8; 359-65). The evidence with respect to the loss in operations was permitted by the trial court only as bearing on the question of what Rasmussen's intentions may have been at the time of the sale, so far as issue (B) is concerned (R.161-179).

Appellant also asserts in its statement of the case that the appellee sent business of a Yakima concern from the area to another outside service bureau. This again is a statement of a matter wholly unconnected with the

issues on appeal. A simple reference to the record will show that there was a valid reason for Tufts forwarding its special in-put material for processing. The NCR 390 did not read this type of material (R.78). The court will note that the issues involved on appeal require only a consideration of the evidence offered by the appellant, and that is all the evidence that the appellant has brought to this court. It did not bring here any of the evidence offered by the appellee in the lower court, and this of course was proper. But it now ill becomes appellant, having brought only its own evidence to this court, to cite it to the court in connection with matters which were clearly disputed and which are extraneous to the issues tendered on appeal.

## SUMMARY OF ARGUMENT

Under the law of the state of Washington, a recovery for alleged fraud can only be had by presenting clear, cogent and convincing evidence in support of all nine elements which the law holds constitute a fraud. Failure to establish any one of the elements by clear, cogent and convincing evidence is fatal to the claim. The appellant has failed to offer sufficient evidence or inference from the evidence, taken most favorably to the appellant, to establish any claim for fraud under the applicable law prescribing the quantum of evidence required.

With respect to the issue involving the alleged inadequacies of the equipment, the evidence falls far short of establishing by clear, cogent and convincing evidence or inference therefrom that any false representation was made with respect to the capacity of the equipment. It appears that the equipment and its capacity were not falsely represented. The only claim of deficiency in performance of the equipment which appellant has supported by any evidence is a claim that it had a slow print-out rate. It affirmatively appears from the evidence that the appellant knew of the slow print-out rate before it purchased the equipment, and planned to compensate for it, and that the appellant did not rely upon and had no right to rely upon any representation with respect to the print-out rate. To the extent that appellant seeks to convert the representation relied upon - - that is, that the equipment was adequate for service bureau work - - into a representation that the equipment would operate successfully or profitably, it is not relying upon a misrepresentation of an existing fact but the alleged nonperformance of a future promise, which cannot support an action for fraud, nor does the evidence tend to establish that appellant relied or had a right to rely on such claimed representation.

With respect to the issue involving the claim that the appellee promised to obtain future patronage for the

equipment sold, the appellant is again attempting to recover for alleged fraud by reason of claimed breach of a future promise, and an action in fraud will not lie. To the extent that the appellant claims there was a present fraudulent intention not to perform a future promise to provide patronage, the evidence is wholly insufficient to establish such an intent, and, indeed, the evidence establishes an intent by the appellee to perform its voluntary commitment in this respect, and establishes that it did perform such voluntary commitment.

## ARGUMENT

The appellee will follow the pattern of the brief of appellant and argue the claim of fraudulent misrepresentation with respect to the equipment under heading (A) and the claim of fraudulent misrepresentation with respect to obtaining future patronage under heading (B).

The appellee agrees that this is a diversity case and that the law of Washington governs. The appellee does not agree that the basis for determining the validity of the dismissal of the action is whether there is some evidence or inference from some evidence to support a recovery. The proper measure that was applied by the trial court at the conclusion of hearing evidence was whether or not there was any *clear, cogent and convincing evidence or inferences* therefrom to establish a clear, cogent

and convincing right of recovery, this being a fraud and not a breach of contract action.

Primarily, the principles of law announced by the Supreme Court of Washington, and which were the law of that state at the time of trial and now, should be kept in mind. The nine essential elements of fraud which must be established are: 1. A representation of existing fact; 2. its materiality; 3. its falsity; 4. the speaker's knowledge of its falsity, or his ignorance of its truth; 5. an intent by the speaker that the person to whom the representation is made should rely thereon; 6. ignorance of its falsity by the person to whom the representation is made; 7. the latter's reliance upon the truth of the representation; 8. his right to rely; and 9. his consequential damage.

Lack of any of these elements is fatal to the cause of action. *Puget Sound National Bank v. McMahon,* 53 Wn. 2d 51, 330 P. 2d 559 (1958).

Fraud must be proved by clear, cogent and convincing proof. *Williams v.Joslin,* 65 Wn. 2d 696, 399 P 2d 308 (1965). *Baertschi v. Jordan,* 68 Wn. 2d 478, 413 P. 2d 637 (1966) *Brown v. Underwriters at Lloyds,* 53 Wn. 142, 332 P. 2d 288 (1958).

Honesty is presumed, and the burden of proving fraud is upon the party alleging it. *Columbia Intern. Co. v. Perry,* 54 Wn. 2d 876, 344 P. 2d 509. (1959)

The presumption is against the existence of fraud and in favor of innocence, the presumption against fraud approximating in strength the presumption of innocence of crime. *Dobbin v. Pacific Coast Coal Co.*, 25 Wn. 2d 190, 170 P. 2d 642 (1946).

This court has followed these principles in diversity cases. *A. B. C. Packard, Inc. v. General Motors Corp.*, 275 F. 2d 63; *Asheim v. Pigeon Hole Parking, Inc.*, 283 F. 2d 288.

(A)

Tested by the foregoing principles, did the appellant offer sufficient evidence to establish fraud with respect to the alleged representations of Rasmussen concerning the equipment itself? The pretrial order and the evidence in the case confined this issue to an assertion by the appellant that Rasmussen and the company had represented that the NCR 390 was suitable and adequate for service bureau work. The response of the appellee to this was that the machine was suitable and adequate for such work and sold for that purpose (Tr. 36-45; 21-32). Thus we have an admitted representation made concerning the equipment, and the first inquiry is to determine whether such a statement was false. The appellant contend the statement was false and that the equipment was not suitable for service bureau work because the machine was allegedly deficient in the following particulars:

1. The print-out and reading rate thereof were too slow.

2. The memory core was not large enough.

3. The equipment lacked the capacity of handling alphabetical work. (Tr. 36-43)

It is conceded that the mechanical print-out and reading rates of the equipment were not misrepresented to appellant before the purchase of the equipment, and it is not established or indeed claimed that the print-out and reading rate of the equipment when it was supplied was any different than it was represented or known to be by the appellant when it purchased the equipment. It is not contended that the size of the memory core of the equipment supplied was different than it was represented to be to the appellant when it purchased the equipment. It is not claimed to the contrary, but indeed admitted, that the equipment would handle alphabetical work. Under this state of the record it is difficult to comprehend how it can be claimed that there was clear, cogent and convincing evidence that the representations of the defendant with respect to the equipment itself were false. An examination of the record is convincing that the appellant is simply complaining that it purchased a piece of equipment for service bureau work which, under its method of operation, did not turn out to be as profitable as it hoped that it might be, and that it eventually abandoned the use

of this smaller NCR 390 equipment and installed some larger and considerably more expensive equipment with which it is now apparently satisfied. (R. 291-293) The fact is, and the record supports that fact, that the appellant did carry on service bureau work with the equipment from 1962 until into 1966. (R. 236, 240) That it did not come up to the projected business desires of the appellant could be due to a variety of causes, such as lack of patronage, inefficiency of the appellant in operating the equipment, failure of the appellant to program the equipment properly, or, as appellant contends, that the equipment was too slow. But appellant has brought an action in *fraud*, claiming that the manufacturer of the equipment, the appellee, misrepresented the capacity of the equipment, while at the same time it admits that the capacity of the equipment furnished was no different than what it was represented to be before the purchase. Appellant is in the position of one who purchases a 1961 model truck for the purpose of hauling freight upon the representation of the seller that the truck is suitable for hauling freight, and then claims that he has been defrauded because, while admitting that the truck does haul freight and has been used by him for hauling freight, says that it does not haul the freight often enough, rapidly, or in the amount which he hoped that it would or as his new 1966 model does.

What appellant has actually tried to establish on this phase of the case is a breach of a claimed warranty, which is entirely different from fraud. The difficulty which appellant would have in supporting a claim for breach of warranty is obvious, because from the record it appears that it kept and used the machine in its business month after month for more than three years after it was installed, before it sold and replaced it with a larger and later model machine, and because its contract would obviate such an action at such a late date. (Exh. 2) It is also apparent that the gist of the claimed misrepresentation with respect to the equipment asserted by the appellant is that it printed too slowly. Despite all the hue and cry about programming, repairs and other extraneous matters, the record shows that this is the only real complaint which appellant has concerning the performancce of the equipment it bought. The appellant is vigorous in its denunciation of the equipment on this one ground, but that is not a substitute for clear cogent and convincing evidence that the equipment was misrepresented in this respect and that the appellant relied upon and had a right to rely upon the representations of the seller in this respect. Mr. Fluaitt, the agent and officer of the appellant, who principally negotiated the purchase knew before the company ever bought it that its print-out rate was slow, and planned before purchase to use another piece of printing equipment to supplement the print-out of the NCR 390. He not only planned to do

this before its purchase, but actually did carry out his intention after the purchase. As appellant states, Mr. Fluaitt apparently never got around to telling the managing director and principal officer of the appellant, Earl W. Carlsen, that he knew the print-out rate was slow before Carlsen decided to purchase the equipment, but this is of no comfort to appellant. The corporation is affected with constructive knowledge of all material facts of which its agent acquires knowledge while acting in the course of his employment, although the agent does not in fact inform the principal thereof. 3 CJS, Agent, Sec. 262; *Lowenthal Co. v. McCormack Bros. Co.,* 144 Wash. 229, 257 Pac. 632; *Rocky Mountain Fire & Gas Co. v. Rose,* 62 Wn. 2d 896, 385 P. 2d 45 (1963).

It is clear that Mr. Fluaitt knew of the print-out rate of the equipment he purchased, had made provision for other equipment to increase the print-out rate, that the print-out rate was not represented to him to be greater than it was, and the appellant is hardly in a position under these circumstances to claim its reliance upon and its right to rely upon any representations attributed to the appellee company in this respect. Certainly the record would hardly support a finding that the alleged reliance by the appellant and its right to rely upon representations concerning the print-out rate, in-put rate, size of memory core and alphabetical capacity of the equipment is sup-

ported by any evidence that could rise to the dignity of being called *clear, cogent and convincing.*

In its brief the appellant cites at length from the evidence of Fluaitt in an attempt to evade the impact of his testimony, but its references to his testimony contained on pp. 15-19 of its brief do not give the true impact of the Fluaitt testimony because of certain omissions therefrom, omissions of testimony which constituted the basis for the ruling of the trial court that the appellant, by reason of the admitted knowledge of Fluaitt, had no right to rely on claimed misrepresentations of the appellee concerning the capabilities of the equipment being purchased. For example, there are omissions commencing at the bottom of page 16 of the brief of appellant, and the entire testimony of Mr. Fluaitt on these pages was as follows (R. 234 [first page 234] -229).

"Q Tell me, and tell the Court here, when it was that you first determined in your own mind that the printout of this equipment was too slow.

A As I stated, during our early discussions, it would be too slow for some things.

Q And you understood that before the equipment was actually purchased?

A Yes, sir.

Q Did you explain that to Mr. Carlsen and Mr. Hunter, that you knew the printout was too slow?

A It is possible, I do not know.

Q What would be your best recollection, considering that this was an important transaction of business in your company?

A I don't recall.

Q In any event, you had arrived at that conclusion?

A That conclusion, which was offset by Mr. Rasmussen's —

Q Well, now, you had arrived at it, is that right?

A In a limited fashion, yes.

Q Now did you, prior to your acquisition of it, and in your discussions with Mr. Rasmussen, from September up to December 1, discuss the read-rate of this equipment?

A It is probable.

Q Do you have any recollection of ever having done so?

A I don't recall.

Q Do you have any recollection now that the reading rates of which this machinery is capable after you acquired it were any different or less, perhaps than Mr. Rasmussen represented them to be before you decided to buy the machine?

A No.

Q Do I understand that you say this machine is incapable of producing alprabetical work?

A I did not say it was incapable; I said it does it too slowly. It does it too slowly for volume work.

Q In other words, we are not to understand, are we, that this equipment does not produce alphabetical work. It does, doesn't it?

A It will read alphabetical characters, and print alphabetical characters, but will not assemble, compute, or store.

Q So we may understand this further, Mr. Fluaitt, before you even acquired this machine, you had IBM equipment that was line printing equipment, is that right?

A Yes.

Q Would you explain to these folks what you mean by line printing equipment?

A Equipment which prints one line at a time. All the characters are determined by the input we put into this — all the keys come up at one time, so a full line of print — our machine I believe has eighty-eight type bars and they all print at once.

Q In other words, to use an illustration, you had equipment already on hand in which if we wanted to print the expression "Now is the time for all good men to come to the aid of their country,"— I don't know whether that has more than eighty-eight figures in it, but as an illustration, you had equipment that would print that whole line on a piece of paper, and keep printing it, is that right?

A Yes.

Q The 390 type of alphabetical work you describe as

something like an automatic typewriter, that would print N-o-w i-s t-h-e, and so forth, and would run it off as a fast typewriter?

A Yes.

Q Now as a matter of fact you knew before you even acquired this, based upon your experience in the field, and the fact that you already had a line-type printer on hand to use, that this was the distinction between the two, didn't you?

A It was different, yes.

Q Well you know this before you even acquired it; you knew that the 390 printed one character at a time, and was not a line printer?

A Yes, sir.

Q Well let me ask you if you did not, to refresh your recollection, testify in your deposition — do you remember when it was taken, Mr. Fluaitt?

A Yes.

Q I am on Page 58, Line 7. Do you remember this question being asked:

"Question: What you are telling me is that the statement was made that 'This machine will take care of the data processing work you have, and we will provide for you.' Do you read into that the implication that it will read fast and print out fast?

"Answer: No. I read into it that it will do the things that must be done, whether it reads fast or slow is of no importance, it is the point it will do these things."

Now did you so testify?

A Yes, sir."

Again adverting to the references to the testimony contained in the brief of appellant upon the re-cross examination of Mr. Fluaitt, it is important to have all and not part of his testimony on these points in mind. He testified:

"Q Now you tell us, Mr. Fluaitt, that at the time you acquired this machine, until after you acquired it, you had no knowledge of its inadequacies for service bureau work until after it got here and you tried to work with it; is this right?

A Yes, sir.

Q What were the inadequacies?

A It could not produce some jobs rapidly enough to satisfy the customers.

Q Your printout rate was too slow?

A In some cases, yes.

Q Now are you going to tell us you didn't know that inadequacy before you acquired it?

A No, sir.

Q So there is an inadequacy, that you call an inadequacy, that you knew about even before you acquired the machine, isn't this true?

A This again is where Mr. Rasmussen insisted that this machine would take care of all of our work, and we assumed —

Q Well, I'm sorry, Mr. Fluunitt.

MR. GAVIN: I am sorry to have to interrupt, your Honor, but this is unresponsive.

THE COURT: Don't apologize to me. You can interrupt him any time you wish if he doesn't answer your question.

MR. GAVIN: Well I hate to interrupt witnesses, but I move to strike it as non-responsive.

THE COURT: Your question was that he knew about this inadequacy even before he acquired the machine, isn't that right; and he has already answered yes, that he knew that.

MR. GAVIN: Yes. All right, thank you.

Q (By Mr. Gavin) What other inadequacies did the machine have, other than its slow printout? What other inadequacies that you later discovered, Mr. Flusitt?

A We could not put a large program into the machine.

Q Why not?

A Because it did not have enough cells or memory.

Q So you say the cells of memory you found out later were inadequate, is this right?

A For the jobs that were involved.

Q Yes. Now am I to understand that you claim Mr. Rasmussen misrepresented the size of the memory core of this equipment to you?

A No, sir.

Q All right, what other inadequacy that you say you later found out?

A The slowness of the read in of our alphabetic input.

Q Yes. I think you have told us already that you appreciated by your own experience in the field that you were buying a piece of equipment that printed alphabetically, character by character, rather than a line printer, isn't that right?

A Yes.

Q So this was knowledge you had before the machine ever arrived there?

A Yes, sir.

Q As a matter of fact, Mr. Fluaitt, your opinion of this equipment at the time your deposition was taken last August is that you felt at that time if you could have acquired enough customers, that the bureau would have operated profitably with this equipment, is that right?

A With a volume of customers, perhaps yes.

Q In other words, the inadequacies you are talking about with regard to the machine, regardless of what you call them, it was your opinion at least when the deposition was taken that if enough customers had been produced for you, or you had enough customers, it would have operated successfully as a service bureau in any event?

A If we had enough customers like Birdseye, no sir. Like the credit unions, yes, sir.

Q Well, did you testify as follows, I am on page 35, Line 18 of the deposition, Counsel: — I mean 20:

> "Question: I take it you have a feeling that the customers or clients were there ready to be obtained by somebody, is that right, that would have made this a successful operation if somebody had gone out and got the customers and clients and brought them in, you would have had a successful operation with this equipment?
>
> "Answer: I believe so.

A Yes, sir.

Q And that is right, isn't it?

A I made that statement.

The appellant, in its argument in connection with issue (A), takes the position that its reprsentative, Mr. Fluaitt, was entitled to rely upon the claimed representations of Mr. Rasmussen concerning the equipment, even though Flauitt knew of the slow print-out rate of the equipment before purchasing it, because it is claimed that somehow Rasmussen overcame the admitted knowledge of Flauitt about the slow print-out rate and deceived him or prevented him from making further inquiry or investigation about the matter. In this connection, the appellant relies principally on the cases of *Miraldi v. Wick*, 117 Wash. 207, 200 Pac. 1094, *Rummer v. Throop*, 38 Wn. 2d 624, 231 P, 2d 313, *Jenness v. Moses Lake Development Co.*, 39 Wn. 2d 151, 234 P. 2d 865, *Forsyth v. Dow*, 81 Wash.

137, 142 Pac. 490 and *Scroggin v. Worthy,* 51 Wn. 2d 119, 316 P. 2d 480.

The cited cases establish the principle that in cases in which a purchaser is *suspicious* about the goods to be purchased, or *suspicious* of some defect that might exist in the goods, and undertakes an inquiry concerning same or makes direct inquiry of the seller concerning same and the seller wrongfully and deceitfully dissuades the purchaser from making further inquiry or gives him direct assurances that his suspicions are unfounded, then the purchaser is entitled to rely upon these false representations of the seller even though he may have some knowledge or suspicion himself concerning the matter.

Of course that is patently not the situation that we have in the case at bar. Mr. Fluaitt did not merely have some *suspicion* that the equipment had a slow print-*out* rate and make inquiry about it, and Mr. Rasmussen did not represent that the print-out rate was any different than it actually was, but here, Mr. Fluaitt *knew* that the equipment had a slow print-out rate, knew the type of print-out with which the machine was equipped, already had in his possession a more rapid printer with which he intended to overcome the slow print-out rate, and actually put this piece of equipment into operation with the NCR 390 after it was delivered. Under these circumstances the appellant had no right at all to rely on any lack of speed as a basis

for asserting that the transaction was touched with fraud.

It appears in *Miraldi v. Wick, supra,* the first case cited by appellant, that the purchaser observed some white substance on the property being purchased and asked the seller what it was and was told that it was alkali, that too much would hurt the production of the land but that the amount that he saw was not enough to hurt the growing of crops, and the seller thus deceitfully persuaded the purchaser not to make further inquiry. It is typical of the other cases cited. In the case at bar the situation is as different as if the purchaser in *Miraldi v. Wick, supra,* had direct knowledge that the alkali was in sufficient quantity to restrict crop production, and already had in his possession and intended to use leeching out equipment to overcome the alkali problem and did use it on the land after he acquired it.

The case at bar is analogous to those cases in which a purchaser having equal knowwledge or having an opportunity to investigate the claims of the seller, either does so and satisfies himself as to the validity of them or, having the unhindered opportunity to do so, fails to do so. In such cases there is no basis for claiming that the purchaser can rely on any representation. Here Fluaitt observed the equipment in operation before it was delivered, and actually concluded in his own mind that it did not

operate properly, (R. 240-1) but apparently failed to reveal his information to the other officers of the corporation. (R.384, 393-4) But what he knew bound the corporation. *Lowenthal Co. v. McCormack Bros. Co.*, 144 Wash. 229, 257 Pac. 632; *Rocky Mountain Fire & Casualty Co. v. Rose*, 62 Wn. 2d 896, 385 P. 2d 45 (1963).

There is a failure to show any reliance upon the representations in this respecct by that clear, cogent and convincing evidence which the law of Washington requires. The Washington court has not hesitated to dismiss an action for fraud when there has been a failure to establish reliance by that quantum of proof. In *Puget Sound National Bank v. McMahon*, 53 Wn. 2d 51, 330 P. 2d 559 (1958), a plaintiff purchased certain apartment house property. The seller told the representative that there was new plumbing throughout the apartments and the equipment and furniture were new and in good condition. He also made representations concerning the net profits of the apartment house operation. The purchaser observed the condition of the plumbing, furniture and equipment and *knew* what it was, *and could base no claim of fraud on these representations.* The court also found that the representation with respect to the net profits was not to be relied upon because the purchascer *knew* from her own experience in connection with such a business that such represented profits were not correct. In this case we have Mr.

Fluaitt with knowledge of the slow print-out of the machine, and we have him stating that with respect to the projected profits shown to him in the brochure submitted by Mr. Rasmussen, (Exh. 1), that he, Mr. Fluaitt, did not believe these figures. (R. 223).) The Washington court said:

> "In an action for fraud, the burden is upon plaintiff to prove the existence of *all* the essential and necessary elements 'that enter into its composition,' (See *Webster v. L. Romano Engineering Corp., supra*) one of which is that the representee had a right to rely upon the representation. All of the ingredients must be found to exist. The absence of any one of them is fatal to a recovery. To be remedial, a representation must have been of such a nature and have been made in such circumstances that the injured party had a right to rely on it. It is this element that the trial court found was missing in the instant case.
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> * * *
>
> "The evidence has failed to establish one of the essential and necessary elements that enters into the composition of fraud, and the judgment must be affirmed."

See also *Michaelson v. Hopkins,* 38 Wn. 2d 256, 288 P. 2d 759 (1951); *Guier v. Shaw,* 48 Wn. 2d 48, 290 P. 2d 702 (1955); *Ketner Bros. Inc., v. Nichols,* 52 Wn. 2d 353, 324 P. 2d 1093 (1958); *Dragos v. Plese,* 39 Wn. 2d 521, 236 P. 2d 1037 (1951).

Under issue (A), appellant also urges that the alleged representations concerning the equipment, and, in parti-

cular, representations concerning its printout rate, are actionable by expanding the representation concerning the equipment from one that the equipment would be suitable and adequate for service bureau work into one that it would be suitable and adequate to *successfully and profitably* perform service bureau work. Appellant then urges that the equipment, as operated by it, did not perform profitably and accordingly claims fraud. Leaving aside for the moment the fact that the issue tendered in the pre trial order was whether the equipment was or was not represented to be suitable for service bureau work, and not wether it would or would not produce a profitable operation for appellant, (Tr. 36-43), it should be noted that this alleged expanded representation immediately raises the question of whether or not it is one of existing fact, which is necessary to support an action of fraud. Although the trial court basically granted a dismissal of the action as to issue (A) on the grounds that the appellant was not entitled to rely on any representations in this respect, the trial court was also correct in its dismissal because the representation, if it is tied to future profits, then becomes not a representation of existing fact, but a statement as to future performance or a representation that something will be done or occur in the future and is not actionable.

The Washington court has specifically laid down the rules governing the determination of whether a representa-

tion is one of existing fact or an expression of opinion about something to take place in the future. The guidelines for this determination are set forth in *Shook v. Scott*, 56 Wn. 2d 351, 353 P. 2d 431 (1960), citing from *Nyquist v. Foster*, 44 Wn. 2d 465, 268 P. 2d 442:

> " 'It is helpful to consider the reasons supporting the usual rule that fraud can be predicated only upon representations of existing fact. Among the several reasons stated by authorities are the following: (a) A statement as to future performance is a "mere estimate" of something to take place in the future; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; (b) ". . . a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made;" 23 Am. Jur. 799, 801 § 38; See, also *Rankin v. Burnham*, 150 Wash. 615, 274 Pac. 98; and (c) ". . . were the rule otherwise, any breach of contract would amount to fraud; and that to permit a rescission for fraud by one who has no ground for complaint except an unfulfilled promise—a broken contract—would obscure elementary distinctions between remedies, and tend to nullify the Statute of Frauds." 51 A. L. R. 46, 61, Annotation.'
>
> "The proper test to apply, in determining whether a representation pertains to an existing fact or is a mere expression of opinion or a promise, was set forth in that case in these words:
>
> " '. . . Where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, then the representation is not of an existing fact. . . .' "

Tested by those guidelines, the satisfaction of the thing claimed to be represented, that is, a profitable service bureau operation, is necessarily dependent upon the occurence of future events, future uses and future requirements of the representee, Fruit Industries. In the *Shook* case, *supra,* the representation involved the volume of water that would be available to the purchaser in connection with his use of the property in the future. The amount of that water depended on future uses and future events. In this case, whether the appellant, in using the equipment, would return a profit to itself depended on the volume of business, its efficiency of operation, its customer relations, and a variety of other factors which only the future would establish.

Further, it is apparent that the appellant did not rely upon any claimed representation of Mr. Rasmussen concerning the amount of income the operation would produce, for Mr. Fluaitt himself testified as follows:

"Q All right. And did Mr. Rasmussen at any time when you were present, Mr. Fluaitt, in these conversations, guarantee to you that this operation you were going to enter into was going to be profitable?

A No guarantee.

Q All right. I think your counsel presented to you Exhibit 1. If I am not mistaken, didn't Mr. Hutcheson show you that and ask you for some comments on it, in your direct examination yesterday?

A Yes, sir.

Q When this was presented to you — in the first place, was this presented? I am sure you said it was, during some conversation with Mr. Rasmussen.

A Yes.

Q When you were present. You understood this was an example, did you not, of what might be done with the 390?

A Yes.

Q And as a matter of fact, you didn't yourself believe at that time, or upon that presentation, that the example of income reflected on it could be obtained?

A That's true.

Q And you therefore did not rely upon those figures of potential income in making any judgment of your own about this equipment?

A Not these incomes listed here."

The trial court was manifestly correct in dismissing the action so far as it involved issue (A) by reason of a lack of any clear, cogent and convincing evidence or inference therefrom establishing that appellant relied on or had a right to rely on representations concerning the equipment itself. Its dismissal is also correct by reason of the fact that there was no clear, cogent and convincing evidence that the representations concerning the equipment

were false, and if they are to be regarded as representations that the equipment could be operated profitably, they were not representations of existing fact but expressions of opinion only and not actionable.

(B)

It is abundantly clear that the representation attributed to Mr. Rasmussen prior to the purchase that he, Rasmussen, would aid, assist and cooperate in furnishing business and patronage to the appellant and that appellant would not need a sales force, can be nothing but promise to perform a future act, and cannot be possibly characterized as a representation of an existing fact. As we have already seen, statements of things to happen in the future or promises to do something in the future are not actionable in a claim for fraud. *Webster v. Romano Engineering Co.*, 178 Wash. 118, 34 P. 2d 428; *Williamson v. United Brotherhood of Carpenters,* 12 Wn. 2d 771, 120 P. 2d 833 (1942); *Shook v. Scott, supra; Korth v. Holland,* 43 Wn. 2d 618, 262 P. 2d 772 (1953); *Baertschi v. Jordan,* 68 Wn. 2d 478, 413 P. 2d 657 (1966); *Andrews v. Standard Lumber Co.,* 2 Wn. 2d 294, 97 P. 2d 1962 (1940). *Schlaadt v. Zimmerman,* 206 F. 2d 782.

The representations claimed to be actionable in *Webster v. Romano Engineering Co., supra, and Andrews v. Standard Lumber Co., supra,* and which were held by the Washington court not to be actionable, are very simi-

lar to the representations upon which the appellant founds its action in this case. In the *Webster* case, the seller assured the purchaser that the grader which he was going to buy would perform work for which it was intended to be used under the existing conditions, and it failed to perform in this manner. The Washington court said:

> "* * * the representations relied upon by appellant cannot form the basis of an action for deceit. They are expressions of opinion about something to take place in the future, namely, what the grader would do under certain conditions. They relate neither to a past transaction nor to an existing fact."

In the *Andrews* case, the seller represented to the buyer that if he would enter into a contract to build a home, the seller would use a so-called Pabco plan, and that under the plan the seller would control and supervise the construction of the home and that by using it the home could be completed for $3700.00, free and clear of all liens. When the house was built, it was found that $3700.00 was not sufficient to build the house, and liens were filed against it. The Washington court said:

> "It is quite obvious that the representations did not relate to an existing fact, but only to the results that would obtain by the use of the Pabco plan, that is, that the cost of the building would not exceed $3,700. Appellant did not sell the Pabco plan or anything else to respondents. All it did was to extoll, through its agent, the virtues of the plan and explain how, by following its provisions, respondents would get a com-

pleted house without any liens or encumbrances against it."

Appellant impliedly admits that we are here dealing with a promise of a future performance rather than a representation of an existing fact, but urges that if there was a present intention not to perform the future promise that an action for fraud can be predicated thereon. The trial court recognized the right of the appellant to attempt to establish intent by showing the conduct and actions of the appellee so that there would possibly be some basis for a trier of the fact to draw therefrom the inference of what the intention of the speaker was. The record reveals that Mr. Rasmussen and the employees of the appellee did, whether it be pursuant to the commitment appellant claims was made or pursuant to the program which Mr. Rasmussen had in mind, supply patronage and customers to appellant and did interest its prospective customers in using the service of appellant (R. 68-73; 155-160).

If evidence had been offered that Rasmussen and the employees of the appellee never contacted anyone or contacted prospective customers but made no mention of the service bureau of appellant and sent no one to appellant, some inference might be drawn from that conduct of a lack of intention to perform a future promise. But there is no such evidence. There is nothing at all in conduct of appellee which would indicate an intention

other than to interest customers in using the service of the appellant. Certainly there is no clear, cogent and convincing evidence that the conduct of the appellee would permit an inference of a dishonest intention not to perform a future promise.

In its brief, appellant points to but two items in the record which it claims' supports its contentions in this respect. It is asserted that Mr. Rasmussen "admits" that there was no intention on his part to perform the promise to furnish customers to the appellant. This statement is based upon a misinterpretation of an answer by Rasmussen to a question put to him, and intentionally ignores the context in which the question was asked and answered over what appellee submits was a valid objection on its part. On examination by counsel for the appellant, Mr. Rasmussen was asked if there was not an arrangement by which he would sell in-put equipment to his customers for later use of appellant service bureau. He specifically denied there was any such arrangement. (R. 35) He was asked if he had made a statement that his company would bring sufficient customers to the appellant so as to make it a "good, profitable, going enterprise." He flatly denied making any such statement (R. 36). Counsel having received answers in which Mr. Rasmussen denied any arrangements or agreements to furnish sufficient customers so that appellant would have a profitable operation, then

asked him if he had any "intention" to furnish sufficient customers to produce a profitable operation for the appellant. To this question objection was interposed, and the court permitted a yes or no answer, and of course Rasmussen responded in the negative (R. 38-41). The question was impossible to answer. The witness was put in a position in which he had to answer in the negative because if he answered in the affirmative, he would then be admitting what he had just denied. This situation hardly affords appellant a basis for seriously arguing that there is some clear, cogent and convincing evidence that Mr. Rasmussen did not intend to perform a future promise when the record shows that the promise was performed. No evidence was offered that there were more customers available that could have been contacted and were not contacted in the area.

The appellant also refers to Ex. 5, in particular a letter of September 14, 1964, written almost three years after the transaction between the parties had been consumated. The letter, from NCR to Fruit Industries, contains a statement that the company had advised its personnel of the danger of assuring any specific sales volumes to independent service bureaus in the United States. The appellant apparently wants to draw the inference from this statement that NCR was admitting that Rasmussen guaranteed some specific sales volume. Of course no such

inference can be logically drawn, but a quick answer to the contention is that the officers of the appellant never claimed thatRasmussen did assure them of any specific sales volume. One of their principal officers, Mr. Hunter, testified that no dollar volume was mentioned by Rasmussen (R. 131). Mr. Fluaitt testified that he did not place any reliance on the only figures that Mr. Rasmussen provided (R. 223).

The trial court was correct in holding that with respect to issue (B), at the end of appellant's evidence, that it was not relying upon a claimed misrepresentation of present fact for recovery, but upon a promise to perform in the future, and that there was no evidence or inference therefrom arising to the level of *clear, cogent and convincing,* which would permit the submission of the issue to a trier of fact.

## CONCLUSION

It is a truism stated by the Washington Supreme Court in *Forsyth v. Davis,* 152 Wash. 595, 278 Pac. 67, that "Every case of this character must rest upon its own facts, subject to certain general principles." It is also a truism, as stated by the court, that other opinions are seldom of more than general assistance in determining whether the facts in a particular case do or do not support a claim for fraud. But applying general principles to this case and reading the record in its entirety cannot help

but be convincing that the trial court was clearly correct in dismissing this action. There was no evidence offered by the appellant, or inference from that evidence, which reached the level of being clear, cogent and convincing with respect to either of the two contentions advanced by the appellant. There was no showing that the alleged representations were false, that they were other than expressions of opinion, and it appears in any event, that appellant had such background and knowledge of the business at hand that it could not be said to have relied or to have had a right to rely on the representations. A reading of the record in its entirety, appellee submits, is most convincing that appellant had at best a complaint of alleged nonperformance of a contractural agreement or warranty, and, to be most charitable, had mistaken its proper remedy. It is not even clear in the record that it had any valid complaints in that regard, and of course all of the evidence is not before the court. The judgment of dismissal of the trial court should be affirmed.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

JOHN GAVIN,
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